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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 545

In re THE AMERICAN SUGAR REFINING COMPANY, PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY,
PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899; and

Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

CHARLES CARROLL AND
JOSEPH W. CARROLL,
Attorneys for Petitioner.

T. H. THOMASON, PRINT, 528 NATCHEZ STREET, N. O.

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Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

Now comes The American Sugar Refining Company, a corporation, petitioner, and applies to the Supreme Court of the United States for leave to file the petition, herewith presented as part hereof, for a writ of mandamus to com-

mand the Judges of the United States Circuit Court of Appeals for the Fifth Circuit to hear, try and adjudge a certain cause entitled, "The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error," No. 920, November Term, 1899, on the docket of said Circuit Court of Appeals; the said writ of mandamus being prayed to be issued only in the event that this Honorable Court shall, in its discretion and judgment, deny the petition herewith filed for a writ of *certiorari* in the same cause.

THE AMERICAN SUGAR REFINING COMPANY,
Petitioner,
By CHARLES CARROLL AND
JOSEPH W. CARROLL,
Its Attorneys at Law.

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Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the American Sugar Refining Company, a corporation organized and existing under the laws of the

State of New Jersey, respectfully shows to this Honorable Court as follows:

1. That on June 14th, 1899, the City of New Orleans brought suit by rule, in the Civil District Court for the Parish of Orleans, Louisiana, as provided by the laws of Louisiana, against the American Sugar Refining Company for a City license tax for the year 1899, for the sum of six thousand two hundred and fifty dollars, with two per cent. per month interest thereon from March 1st, 1899, until paid, claiming said City license tax solely by virtue of the laws of the State of Louisiana and an ordinance of the City of New Orleans; the said tax being claimed from defendant as an occupation tax for carrying on the business of refining sugar and molasses, or either of them, in said City of New Orleans in the year 1899;

2. That thereafter and before the expiration of the delay fixed by the laws of the State of Louisiana for answering, the said defendant, the American Sugar Refining Company, petitioned the said Civil District Court for an order removing said suit to the Circuit Court of the United States for the Eastern District of Louisiana, the said petition for removal being based solely upon the ground that the defendant was a corporation of the State of New Jersey, and the plaintiff, the City of New Orleans, a corporation of the State of Louisiana; which said petition was granted by said Civil District Court, and the bond required to be given was given and filed;

3. That thereafter and before the next succeeding term of the United States Circuit Court for the Eastern District of Louisiana, said defendant, the American Sugar Refining Company, caused to be lodged in said Circuit Court of the

United States a duly certified transcript of the record of said suit in said Civil District Court, which transcript was filed and the suit docketed in said United States Circuit Court under the No. 12,827;

4. That, thereafter, by order of Court, said City of New Orleans, plaintiff, reformed its pleadings in some parts, the reformed petition claiming a license tax from defendant for the occupation of refining sugar and molasses for the year 1899 in the sum of six thousand two hundred and fifty dollars, with interest as hereinabove set forth, and as originally claimed in said rule taken in said Civil District Court; the only difference of substance between said reformed petition and the original rule being that said reformed petition omitted the former prayer for recognition of a lien and privilege on defendant's property and for an injunction against defendant's carrying on its business;

5. That, thereafter, defendant answered the said suit, claiming in its said answer:

First. That it was a manufacturer, and as such exempt from license taxation under Article 229 of the Constitution of the State of Louisiana of 1898, which exempts all manufacturers from State and municipal license taxation, except those of distilled, alcoholic and malt liquors, tobacco, cigars and cotton seed oil; and

Second. That the ordinance of the City of New Orleans under which said tax was claimed was based upon Act No. 171 of the General Assembly of Louisiana of 1898, and that the said Act was in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it exempted from license taxation planters and farmers who refine their own sugar and molasses, and thereby sought

to make an illegal discrimination against those sugar refiners who were not planters and farmers, and denied to defendant, as one of such sugar refiners, the equal protection of the laws of the State of Louisiana; and that the said Act and City ordinance based thereon were therefore unconstitutional and void as to defendant;

6. That thereafter, the said suit was tried before the Court and a jury, and evidence was adduced showing the nature and character of defendant's business in support of its claim that it was a manufacturer, which evidence of the defendant was uncontradicted in every particular; the said evidence also showing that the gross receipts of defendant's business were of such amount that, if liable at all for the license tax, it was liable in the sum claimed; and defendant filed also an exception of no cause of action;

7. That thereupon and at the close of the evidence, defendant requested the Court to charge the jury as a matter of law and upon the whole evidence to render a verdict in defendant's favor; and the plaintiff requested the general charge in plaintiff's favor, which charge requested by the plaintiff was given by the Court and verdict and judgment were rendered in favor of plaintiff for the amount claimed, to all of which defendant duly excepted; and the bill of exceptions was duly settled and signed by the presiding Judge;

8. That thereafter, defendant applied for and obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit to review said judgment, filed an assignment of errors and gave bond to operate as a *supersedeas;* and perfected and completed the said writ of

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error by duly lodging the transcript of record in said Circuit Court of Appeals;

9. That, in due course, the said cause was argued orally and by brief in said Circuit Court of Appeals upon the merits and the points raised by the assignment of errors, and at the close of argument the Court took the case under advisement;

10. That, on the 29th day of May, 1900, a judgment was rendered by said Circuit Court of Appeals, dismissing the said writ of error upon the ground that said Circuit Court of Appeals had no jurisdiction thereof, inasmuch as it was claimed in the suit that a law of the State of Louisiana was in contravention of the Constitution of the United States, that said question was the controlling question in the case and that exclusive jurisdiction to review said judgment of the Circuit Court was vested in the Supreme Court of the United States by the Fifth Section of the Act of Congress of March 3d, 1891 (reported in 104 Federal Reporter, 2); the said judgment being rendered by a majority of the Judges of said Circuit Court of Appeals, his Honor Judge McCormick dissenting.

11. That, thereafter, plaintiff in error, your petitioner, applied for a rehearing upon said question of jurisdiction, setting up that said question of jurisdiction had not been raised by the defendant in error and had not been suggested by the Court during the oral argument, and setting forth that the said Circuit Court of Appeals had jurisdiction of the said matter under the terms of the Sixth Section of the Act of Congress of March 3d, 1891, as the said suit was one between citizens of different States and the jurisdiction of the Circuit Court had been sought and had

attached solely because of the diversity of citizenship of the parties to said suit; which said petition for rehearing the said Court of Appeals took under advisement upon the briefs allowed to be filed therein;

12. That thereafter, on the twentieth day of November, 1900, the said Circuit Court of Appeals denied a rehearing in the said matter and affirmed its previous judgment dismissing the said suit for want of jurisdiction.

13. Petitioner shows that a certified copy of the entire record of the said case in the said Circuit Court of Appeals, including the judgments and opinion rendered therein, is herewith furnished and filed as part of this application, in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Courts of Appeals, and the same is marked "Exhibit A."

14. Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous and that said Circuit Court of Appeals has jurisdiction in law to try and adjudge the said case upon its merits, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the Sixth Section of the Act of Congress entitled, "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes, approved March 3d, 1891," the said case being made final in the said Circuit Court of Appeals by the said Act, as being a suit between citizens of different States.

15. Petitioner shows that, if the Court shall conclude that the Circuit Court of Appeals had jurisdiction of the

said cause, this Honorable Court should nevertheless grant the writ of *certiorari* herein prayed for, inasmuch as the said cause involves other and grave questions of law, which should have and receive the consideration and determination of this Honorable Court; that one of the questions involved in said cause is the right of the Federal Court to find and determine for itself the definition of a word in common use in the language of the country, and to apply the same to the laws of a State of the Union;

16. That if the Court shall reach the conclusion that the said Circuit Court of Appeals was without jurisdiction to try and adjudge the said case, as was determined by said Circuit Court of Appeals, your petitioner represents that this Honorable Court should nevertheless grant the writ of *certiorari* herein prayed for, because at the time that the said writ of error was sued out from said Circuit Court of Appeals, an unbroken line of decisions of this Honorable Court had adjudged and declared the appellate jurisdiction of the Circuit Court of Appeals, under Section 6 of the Act of March 3d, 1891, to extend to all cases in which the jurisdiction of the Circuit Court had been sought and had attached solely by reason of the diversity of the citizenship of the parties to the suit, notwithstanding constitutional questions may have been thereafter injected into the suit by answer or otherwise. *American Const. Co. vs. Jacksonville Ry., 148 U. S. 372 (382); Colorado Cent. Min. Co. vs. Turck, 150 U. S. 138 (144); Borgmeyer vs. Idler, 159 U. S. 408 (414); Press Pub. Co. vs. Monroe, 164 U. S. 105 (112); Ex parte Jones, 164 U. S. 691 (692, 693); Third St. Ry. Co. vs. Lewis, 173 U. S. 457 (460); Pope vs. Louisville Ry. Co., 173 U. S. 573 (578);*

17. That the authorities upon which the majority opinion of said Circuit Court of Appeals rests, even if they be held to establish the correctness of the judgment of said Circuit Court of Appeals, to-wit., *Carter vs. Roberts, 177 U. S. 496*, and *Railroad Co. vs. Thiebaud, 177 U. S. 615*, were rendered by this Honorable Court after the writ of error in this case had been sued out from the Circuit Court of Appeals, and that the time has now expired within which a writ of error can be obtained from this Honorable Court so as to stay the execution of the judgment of the Circuit Court.

18. Petitioner represents that having taken and perfected its said writ of error at a time when the jurisprudence appeared to have been established as vesting the appellate jurisdiction in such cases solely in the Circuit Court of Appeals, it would be a great hardship upon, and practically a denial of justice to, petitioner to refuse to petioner a hearing in the said cause in this Honorable Court, should it be determined that said Circuit Court of Appeals has no jurisdiction in the premises.

19. Petitioner shows that if this Court shall conclude that said Circuit Court of Appeals had jurisdiction to try and adjudge the said cause, and if this Court shall in its judgment and discretion see fit to to deny the writ of *certiorari* herein prayed for, then, that a writ of mandamus should be issued out of this Honorable Court to the Judges of said Circuit Court of Appeals, directing them to try and adjudge said cause, the said writ to be issued after such notice to show cause as the Court may determine is proper and according to the practice usual in such cases.

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20. Petitioner shows that it has not, as a matter of right, an appeal or other remedy to review the said judgment by said Circuit Court of Appeals, save by one of the writs herein prayed to be issued.

21. The said case was decided in said Circuit Court of Appeals upon the ground that the controlling question involved was the claim that a law of the State of Louisiana was in contravention of the Constitution of the United States; that petitioner is advised that said judgment denying its jurisdiction by said Circuit Court of Appeals was erroneous and that the uniform construction of said Act of Congress of March 3d, 1891, by this Honorable Court, has been that wherever the jurisdiction of the Circuit Court was primarily invoked upon the ground of diversity of citizenship of the parties to the suit, the Circuit Court of Appeals is vested with exclusive appellate jurisdiction in such cases, notwithstanding the defendant in said suit may have raised in his defense a question involving the construction and application of the Constitution or laws of the United States; that this Honorable Court has jurisdiction to review the judgments of the Circuit Court upon the ground of a Federal question being involved only when the plaintiff in the Circuit Court has founded his case upon some constitutional or Federal right or privilege and the jurisdiction of the Circuit Court has attached by reason of such constitutional or federal right being raised and relied on by the plaintiff.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to said United States Circuit

Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all the proceedings of the said Circuit Court of Appeals in said case, therein entitled *The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899*, to the end that said case may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3d, 1891, or that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said decree of the said Circuit Court of Appeals in said suit, and every part thereof, may be reversed by this Honorable Court.

And petitioner further prays that it may be permitted to file this application for a writ of mandamus, in the alternative; and, if this Honorable Court shall, in its judgment and discretion, see fit to deny petitioner's prayer for a writ of *certiorari*, that thereupon, a rule shall issue directed to the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit, requiring them by a day certain, to answer the exigency of this petition, and show cause, if any they have, why a writ of mandamus should not issue by the Supreme Court, commanding and directing them to hear, try and adjudge the said cause; and that upon the answer of the said Judges of said Circuit Court

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of Appeals, this Court do issue a peremptory writ of mandamus directing and compelling the said Judges to act and do as herein prayed.

And your petitioner will ever pray, etc.

THE AMERICAN SUGAR REFINING COMPANY,
Petitioner,

By CHARLES CARROLL AND
JOSEPH W. CARROLL,
Its Attorneys at Law.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

JACKSON T. WITHERSPOON, being duly sworn, deposes and says: that he is the general and special agent and attorney in fact in the City of New Orleans and the State of Louisiana of The American Sugar Refining Company; that said Company has no general officer in said State of Louisiana, and that affiant is the chief representative of said Company in said City and State, with full power to represent said Company in suits by and against it; that affiant has read the foregoing petition and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me
this.....day of January, A. D. 1901.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

JOSEPH W. CARROLL, being duly sworn, deposes and says: that he is one of the attorneys at law of The American Sugar Refining Company; that, as such, he has had personal charge for the said Company of the case in the foregoing petition mentioned, in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his knowledge and belief.

Subscribed and sworn to before me
this.....day of January, A. D. 1901.